

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of

MAR 10 2003

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(Marion and Johnston City, Illinois)

)
) MB Docket No. 03-13
) RM-10628
)
)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Audio Division

COMMENTS OF JOINT PARTIES

Infinity Broadcasting Operations, Inc. ("Infinity"), licensee of radio stations WBBM(AM), WBBM-FM, WSCR(AM), and WXRT-FM, Chicago, Illinois, WGN Continental Broadcasting Company ("WGN"), licensee of WGN(AM), Chicago, Illinois, and Bonneville International Corporation ("BIC"), operator of radio stations WNND(FM), WLUP-FM, and WDRV(FM), Chicago, Illinois, WTMX(FM), Skokie, Illinois and WWDV(FM), Zion, Illinois' (Infinity, WGN, and BIC, collectively referred to herein as "Joint Parties"), by their attorneys and pursuant to Sections 1.415 and 1.420 of the Commission's Rules, hereby submit their Comments in the above-captioned proceeding. For the reasons set forth below, the showing submitted by Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"), licensee of Station WDDD-FM, Marion, Illinois in this proceeding is defective and its Petition for Rule Making ("Petition") should be denied. In support whereof, the following is shown.

¹ These five stations are licensed to Bonneville Holding Company, a BIC-affiliated company.

I. Background.

Clear Channel's June 12, 2002 Petition requests that the Commission amend the FM Table of Allotments to change Station WDDD-FM's community of license from Marion to Johnston City, Illinois. The Commission issued a Notice of Proposed Rule Making in this proceeding on January 17, 2003 (the "NPRM"). The NPRM set the comment date as March 10, 2003; these Comments are therefore timely filed.

II. The Petition Fails Because A Move Of WDDD-FM To Johnston City, Illinois Would Disserve The Commission's Core Allotment Policies.

The Petition seeks to change the community of license of WDDD-FM, Marion, Illinois to Johnston City, Illinois. To accomplish this change, Clear Channel must convince the Commission to regard Johnston City as if it were a community without local service, despite the fact that Clear Channel itself is currently licensed to serve Johnston City with WDDD(AM) and holds a construction permit for associated expanded band station WHITE(AM) at Johnston City. Only if the Commission accepts Clear Channel's imaginary foundation would the reallocation of Channel 297B from Marion to Johnston City, Illinois advance the Commission's core allotment priority of providing each community with first local transmission service. The simple reality, however, is that Johnston City is not in need of local service. Clear Channel's conjecture about and hopes for the future of Johnston City cannot form the basis of a successful petition for rule making. Approval of a plan founded on supposition would be inconsistent with well-established Commission precedent.

In evaluating changes in communities of license, the Commission considers, first and foremost, Section 307(b) of the Communications Act.' "[W]e believe it is axiomatic that our

² Section 307(b) provides as follows:

(continued.)

allotment priorities and policies are and should be applied consistent with and in furtherance of the goals of Section 307(b) of the Act.” In the allotment context, the Commission has awarded preferences for the provision of first local transmission service to a community. The Petition fails to demonstrate that Clear Channel should be entitled to this preference.

Johnston City, population 3,557, now boasts local transmission service from WDDD(AM). Associated unbuilt expanded band station WHITE promises future local transmission service to that same community. On the other hand, if granted, Clear Channel’s proposal would deprive Marion, a community of 16,035 persons, ~~of~~ one of its three local radio stations in favor of the much smaller community, Johnston City. The provision of second local service to Johnston City by removing third local service from Marion, a city more than quadruple the size of Johnston City, would not advance the Commission’s allotment priorities.’ Despite

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In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

³ *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 7094, 7095 (1990).

⁴ In determining whether a proposal will result in a preferential arrangement of allotments, the Commission compares the existing and proposed arrangement of allotments under the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982). *See, e.g., Royston and Commerce, Georgia*, 15 FCCR 5676, 5677-78 (Allocations Br. 2000). The FM allotment priorities are: (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. Equal weight is given to priorities 2 and 3. Provision ~~of~~ second local service falls under priority number four, other public interest matters. Although the Commission has in some instances indicated that it will grant a reallocation under priority four where there is no change in transmitter site, in those cases the Commission looked to the populations of the communities in question in order to determine how to best serve the public interest. *See, e.g., Ankeny and West Des Moines, Iowa*, 15 FCCR 4413 (Allocations Br. 2000); *Bay St. Louis and Poplarville, Mississippi*, 10 FCCR 13144

(continued. .)

this reality, Clear Channel would have the Commission pretend that a pending application – an application that must overcome a Staff inquiry⁵ and Joint Parties’ Petition to Deny⁶ – has been granted.

Clear Channel’s Petition is therefore improperly premised on a contingency – that the Commission will grant its application to remove rural Johnston City’s sole transmission service in favor of a close-in suburb of Chicago. Indeed, Clear Channel filed the instant Petition in response to Joint Parties’ Petition to Deny that Chicago move-in application and explicitly stated in the Petition that its “relicense on a first local service preference in this petition is dependent on the action to be taken on the pending application of WHITE to relocate from Johnston City to Berwyn....”⁷ For the Commission to grant Clear Channel’s WHITE relocation application in accordance with the Commission’s allotment priorities, WDDD-FM would have to be reallocated to Johnston City *before* the WHITE application could be approved.⁸ Yet, in order to justify the reallocation proposed in the Petition, the WHITE application would have to be granted *before* the

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(Allocations Br. 1995); *Hallie and Ladysmith, Wisconsin*, 10 FCCR 9257 (Allocations Br. 1995). In all of these cases, the Commission favored the community with the larger population.

⁵ In a letter inquiry, Commission Staff recently raised substantial questions regarding the WHITE application’s adherence to the Commission’s rules. *Letter from Edward P. De La Hunt, Associate Chief, Audio Division, to Mark N. Lipp, Esq. and Lauren A. Colby, Esq.*, November 26, 2002. The Staff’s questions have not adequately been addressed. *See Letter from Joint Parties to Edward P. De La Hunt, Associate Chief, Audio Division*, February 21, 2003.

⁶ *Joint Petition to Deny the Application of Clear Channel Broadcasting Licenses, Inc. for Major Modification to a Construction Permit WHITE, Johnston City, Illinois (Facility ID No. 87178)*, FCC File No. BMAP-2001071 YAAN, filed May 31, 2002.

⁷ *Petition* at 3-4

⁸ The WHITE application has itself now become *contingent* on this rule making, in contravention of Rule 73.35 17, which states simply “Contingent applications for new stations and for changes in facilities of existing stations are not acceptable for filing.”

Commission could approve the proposed reallocation.” Stated another way, WDDD-FM must arrive in Johnston City before the Commission could even consider allowing WHITE to leave, but the Commission cannot even consider allowing WDDD-FM to leave Marion unless WDDD(AM) and WHITE(AM) have already left Johnston City. In sum, the rule making proposal and the application are each impermissibly contingent on the other. As a result, both the Petition and Clear Channel’s related application must be denied.

As demonstrated herein, grant of Clear Channel’s Petition plainly would disserve the Commission’s core allotment priorities. Clear Channel cannot remedy this fatal facial deficiency through reliance on an impermissible contingent application.

⁹ The Commission generally will not accept rule making proposals that are contingent on the outcome of another proceeding that is not final. *See Auburn, Northport, Tuscaloosa, Camp Hill, Gardendale, Homewood, Birmingham, Dadeville, Orrville. Goodwater. Pine Level, Jemison, and Thomaston, Alabama*, 17 FCCR 16277, para. 4 (Audio Div. 2002). “The rationale for this policy is that processing contingent proposals is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on the staff. The staff would *either* have to wait until a contingency is met, thereby further delaying action in a case, or would have to revisit a decision if a proposal was granted contingent on the outcome of an action that never occurred. In either case, the staff’s attempts at processing cases and achieving finality is frustrated.” *Id.* (internal citations omitted).

111. Conclusion.

For the foregoing reasons, Joint Parties respectfully request that the Commission deny the Petition.

Respectfully submitted,

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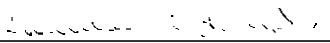
CERTIFICATE OF SERVICE

I, Genevieve F. Edmonds, hereby certify that a copy of the foregoing "Comments of Infinity Broadcasting Operations, Inc." was mailed, first class postage prepaid, this 10th day of March, 2003 to the following

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